Office of the Attorney General
State of Texas

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May 20, 1993

Honorable Betty Denton
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Letter Opinion No. 93-39

Re: Whether the use of the "Denver boot" by a municipal police department constitutes an unconstitutional taking of property without due process (ID# 18191)

Dear Representative Denton:

In your former capacity as chair of the Judiciary Committee, you requested an opinion from this office as to whether a police department may constitutionally use the device popularly called the Denver boot on a vehicle which, according to police records, has accumulated unpaid parking tickets. You are concerned that the use of such a device constitutes an unconstitutional taking of property without due process.

The most lucid description of the potential constitutional issue here is to be found in Judge Easterbrook's decision in *Saukstelis v. City of Chicago*, 932 F.2d 1171, 72-73 (7th Cir. 1991):

> The boot is a huge clamp applied to a wheel of a car. No car can move with the clamp attached. It is sturdy enough to resist determined efforts by drivers to free their vehicles from its embrace . . . .
>
> The Denver boot is a form of pre-trial attachment--in both senses . . . . The due process clause of the fourteenth amendment requires notice and an opportunity for a hearing before the government may deprive a person of property. An auto is property, and immobilization is a form of deprivation.

While the *Saukstelis* decision articulates the potential problem, the Seventh Circuit did not find the use of the Denver boot unconstitutional. Nor did the Iowa Supreme Court in *Baker v. Iowa City*, 260 N.W.2d 427 (Ia. 1977), when faced with a due process argument. Indeed, our research has only found one case holding a booting program unconstitutional in any respect. In that case, *Patterson v. Cronin*, 650 P.2d 531 (Colo. 1982), the Colorado Supreme Court invalidated Denver's booting program because, it found, that program did not afford motorists adequate post-deprivation process.

The key question for any booting program would be the nature of the notice and opportunity to be heard which it offered motorists. *See Saukstelis*, 932 F.2d at 1172. Thus, Judge Easterbrook asserted that the Chicago program presented no constitutional difficulty because "Chicago offers hearings, hearings, and more hearings." *Id.* at 1173.

What constitutes adequate notice and opportunity to be heard will likely require factual determinations in any particular case. We do not make such determinations in the opinion process. Accordingly, we cannot say whether any particular booting program passes constitutional muster. However, the case law we have reviewed indicates that the use of such a device by a city in pursuit of scofflaws is not *per se* unconstitutional.

S U M M A R Y

The use by cities of the Denver boot is not unconstitutional *per se*.

Yours very truly,

Rick Gilpin

Rick Gilpin
Deputy Chief
Opinion Committee